Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-259
	)	
Broadcast Signal Carriage Issues	)	
	)	
Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates	)	MM Docket No. 90-4
	)	
Request by TV14, Inc. to Amend Section 76.51 of the Commission's Rules to Include Rome, Georgia, in the Atlanta, Georgia, Television Market	)	MM Docket No. 92-295 RM-8016

PETITION OF NATIONAL CABLE TELEVISION ASSOCIATION FOR A STAY PENDING RECONSIDERATION OR, ALTERNATIVELY, PENDING REVIEW

Preliminary Statement

On March 11, 1993, the Commission adopted its Report and Order in the above-captioned proceeding implementing the must-carry and retransmission-consent provisions of Sections 4, 5, and 6 of the 1992 Cable Television Consumer Protection and Competition Act ("1992 Cable Act"), Pub. L. No. 102-385, 106 Stat. 1460, 47 U.S.C. Sections 325(b), 534 and 535. NCTA participated in the Commission's rulemaking by submitting comments and reply comments. NCTA intends, in a separate pleading, to petition for reconsideration of certain aspects of

the rules adopted by the Commission. If the Commission allows its rules to go into effect pending reconsideration, however, much of the injury to operators and programmers will occur even before the Commission has the opportunity to resolve these issues. Accordingly, pursuant to 47 C.F.R. Sections 1.429(k), 1.43, 1.44 and 1.45, NCTA hereby petitions the Commission to stay the must carry rules for commercial stations pending reconsideration.[1/] If the Commission is not prepared to grant this stay pending reconsideration, then we respectfully request, alternatively, that a stay pending review in the Court of Appeals be issued.

Background

Congress in the 1992 Cable Act adopted a new regime for cable television's retransmission of broadcast signals. The Act reinstates mandatory carriage rights for local broadcasters -- rights that have not existed since the Commission's previous must carry rules were twice struck down as unconstitutional. Under those rules, a signal was considered "local" and eligible for carriage, based on its proximity to the cable system. The Act, however, provides an entirely new definition of local signals, based on Arbitron's Area of Dominant Influence (ADI). Moreover, it also for the first time imposes a requirement that cable

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1/ "As a matter of discretion, the Commission may rule ex parte" upon NCTA's request "without waiting for the filing of oppositions or replies". 47 C.F.R. Section 1.45(e).

operators obtain consent before they may retransmit certain non-superstation broadcast signals from outside their ADI and stations within their ADI that elect retransmission consent.

The Commission acknowledges that "the net effect of the new must carry rules ... is not yet clear." [2/] Using ADIs instead of proximity to determine must carry status will have unpredictable and anomalous results that are likely to lead to confusion and disruption for operators, broadcasters, cable programmers and subscribers. Nevertheless, the Commission has established an aggressive time frame for implementation of these new rules, and has imposed additional burdens -- over and above those mandated by Congress -- on operators to conduct tests, provide notices, and commence carriage. The Commission-imposed implementation schedule only serves to exacerbate the confusion and costs that the new rules will impose.

We are not here seeking to reargue the constitutionality of the statute, as the underlying lawfulness of the Act's mandatory carriage obligations under the First Amendment will ultimately be resolved by the courts. But it is beyond dispute that this area is infused with First Amendment concerns.[3/] And, separate and

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2/ Report and Order at n. 411.

3/ See, e.g., Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985), cert. denied, 476 U.S. 1169 (1986); Century Communications Corp. v FCC, 835 F.2d 292 (D.C. Cir. 1987), cert. denied, 486 U.S. 1032 (1988); Turner Broadcasting

(Footnote continues on next page)

apart from the burdens imposed on operators and programmers by the must carry and channel positioning requirements of the Act, the Commission's rules implementing those requirements do so in a manner that imposes even greater hardships upon cable operators, programmers, and their viewers. Any rules that go beyond the statutory dictates to unnecessarily impinge on the rights of operators to determine which programming to carry -- and on the ability of cable programmers to reach their audience -- not only may be arbitrary and capricious, but also raise First Amendment concerns above and beyond the infirmity of the statute. These concerns, along with the irreparable costs and disruptions that will occur while petitions for reconsideration are pending, provide a compelling basis to stay the rules until the anomalies and ill-conceived elements are fixed.

We therefore request that the Commission stay the requirement that operators add additional stations on June 2 until October 6 or the date a decision on reconsideration is effective, whichever is earlier. During that period, operators could not drop must carry eligible stations that a system was carrying on the date the stay is issued.

(Footnote continued)

System v U.S., Civ. Action No. 92-2247 (D.D.C. Apr. 8, 1993) (Williams, J., dissenting); Leathers v Medlock, ___ U.S. ___, 111 S.Ct 1938, 1992 (1991); City of Los Angeles v Preferred Communications, Inc., 476 U.S. 488, 494 (1986).

Argument

I. NCTA IS ENTITLED TO A STAY PENDING RECONSIDERATION.

To be entitled to a stay, NCTA need show only that (1) it is likely to prevail on the merits; (2) without relief, it will incur irreparable injury; (3) a stay would not substantially harm other interested parties; and (4) the public interest favors a stay. See Washington Metro Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958); In the Matter of Heritage Cablevision Assocs. of Dallas, L.P. v. Texas Utils. Elec. Co., 8 FCC Rcd. 373, 374 n.27 (1993); In the Matter of Parts 73 and 76 of the Comm'n's Rules Relating to Program Exclusivity in the Cable and Broadcast Indus., 4 FCC Rcd. 6476, 6476-77 (1989). Where the latter three requirements strongly

and programmers in adjusting to the new signal carriage regime. During this initial implementation period, operators may not know the full extent of their carriage obligations until after June 2 -- the date on which commercial must carry rules become effective. It makes ample sense to reconsider this schedule so as to minimize the disruption to viewers -- who may find that signals they have enjoyed for years are no longer carried. The ability of operators to educate their subscribers about the changes mandated by the new rules -- and their ability to set out a rational channel lineup with the minimum amount of changes -- are all compromised by these rules.

1. The Order's Implementation Schedule Will Result in Undue Burdens on Operators, Programmers and Subscribers, and Should Be Modified on Reconsideration.

The rules provide for a fast-paced implementation schedule.

- Beginning on April 2, 1993 -- the date of the rules' publication in the Federal Register -- operators must provide 30 days' notice before deleting or repositioning any broadcast stations. Also beginning on that date, petitions to modify markets to expand a broadcaster's area of must carry protection may be filed.

- On May 3, 1993, operators must give notice (1) to all NCE stations of the location of their principal headend; and (2) to all local stations that may not be entitled to must-carry status because (a) carriage would increase the cable operator's copyright liability or (b) their signal does not meet the signal strength requirements.

- The rules also establish an interim regime lasting from June 2, when the obligation to provide mandatory carriage to commercial stations begins, until October 6, 1993, when retransmission consent and channel positioning provisions take effect.

- While operators must add local commercial stations on June 2, those stations are not required to make their election between must carry or retransmission consent, or even identify their preferred channel position, until 15 days later -- on June 17.

This rapid and disjointed implementation schedule leads to several anomalies and undue hardships on operators and programmers. Rather than changing carriage line-ups and channel

a. Commercial Must Carry Obligations Should Not Become Effective Before the Retransmission-Consent Regime Becomes Effective.

Section 614(f) provides that "[w]ithin 180 days after the date of enactment of this section, the Commission shall, following a rulemaking proceeding, issue regulations implementing the requirements imposed by this section" (emphasis added), and, indeed, the Commission has done so. Section 614(f) is utterly silent, however, on when those rules must become effective.

In our comments filed in this proceeding, we urged the Commission to adopt a single date -- October 6, 1993 -- on which both must carry and retransmission consent obligations would become effective. In its haste to impose mandatory carriage rules on operators, however, the Commission has adopted a schedule that inflicts serious, unnecessary damage on operators, programmers, and the viewing public.

For example, by June 2, 1993, the significant number of operators with limited channel capacity -- serving most cable subscribers -- will be required to add broadcast signals and drop existing program services. Yet, it will not be clear until two weeks later whether in fact those local commercial stations already carried (or stations newly added on June 2) will elect must carry status. It is therefore possible that an operator will be faced with a situation in which stations on June 17 elect retransmission consent -- only to be dropped if a system cannot secure that consent. An operator in the meantime will have been forced by June 2 to drop existing program services -- services

for which an operator may later find it would have capacity to carry if retransmission consent negotiations fail.

b. Operators Will Not Know the Full Extent of Their Mandatory Carriage Obligations By June 2.

Cable operators are required to do an enormous amount of work by May 3, including measuring the strength of the signal of each local television broadcast station, and determining the copyright status of each station. There is no explanation in the Report and Order why cable operators should be required to complete this enormous task in so short a period.

But in any event, even after an operator has determined that certain signals in an ADI may not qualify for must carry status, it may not know the full extent of its must carry obligations on June 2. Broadcasters notified by May 3 that they may be ineligible for must carry status may gain such eligibility if they agree to deliver a good quality signal or indemnify an operator for increased copyright liability. But the Commission refused to impose a deadline for broadcasters to respond to operators after receiving this notice as to whether they are willing to take these steps.[4/] Nor does the Report and Order explain when carriage obligations must begin for these stations. Operators with fewer must carry stations than their "cap" therefore cannot know with any certainty on June 2 whether they

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4/ Report and Order, para. 102.

will be required to add even more broadcast stations, move existing services, or delete existing program services.

Furthermore, the Commission allowed broadcasters to file petitions beginning on April 2 to expand their ADI and obtain expanded cable carriage. But it did not set a deadline by which all such petitions must be filed. This again places a cloud over cable systems' ability to know, with any degree of certainty, what their must carry obligations will be on June 2.

In combination, the failure to place deadlines on broadcasters' must carry demands may force operators to rearrange their carriage lineups three times in a five-month period: (1) on June 2; (2) at some interim point when a station with inadequate signal strength or distant for copyright purposes later asserts must carry rights, or a station outside the ADI obtains an expanded market determination; and (3) by October 6, when retransmission consent becomes effective.

c. The FCC Should Reconsider the Decision to Cause Commercial Must-Carry Obligations to Become Effective Before Must-Carry Stations Are Required to Designate the Channel Position on Which They Wish to Be Carried.

A further difficulty arises from the implementation of the channel positioning requirements. On June 2, 1993, when cable operators must begin carrying must-carry-eligible commercial stations, cable operators will not know whether a given station

channel options, and NCE stations three different options, making it difficult for a cable operator correctly to divine a station's intent. If it turns out on June 17 that a cable operator guessed wrong on June 2, that cable operator will have to move the station on October 6. Accordingly, the Report and Order's implementation schedule will cause twice as much disruption and confusion as necessary.[5/]

2. The Commission's Definition of "Substantial Duplication" Should Be Reconsidered.

On June 2, operators are required to add stations that under the Report and Order, might be subject to blackouts under the FCC's syndicated exclusivity and network non-duplication rules. Therefore, an operator may be forced to substitute a station filled with blackout "holes" for a 24-hour-a-day cable program service.

This result is at odds with Congress' determination that cable operators not be required to carry "substantially duplicating" stations,[6/] to say nothing of the loss of diversity of such a substitution. It can hardly be said that forcing

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5/ The problem is exacerbated by the Commission's refusal to promulgate channel positioning priority rules. Report and Order, para. 90. It is inevitable that there will be instances in which two or more stations will assert a claim to the same channel. But because must carry takes effect before channel positioning elections must be made and conflicting claims resolved, an operator may be required to add a channel on June 2, only to find that it must be moved on October 6.

6/ Section 614(b)(5).

carriage of a station that can be blacked out at the request of other stations for a significant part of its broadcast day affords operators the discretion not to carry duplicating stations.[7/]

The Commission could solve this problem by defining "substantially duplicating," for must carry purposes, in a manner that reflects its definition of duplication in the exclusivity rules.[8/] Yet, if the Commission were to take such steps on reconsideration but not stay the rules, much of the damage already would have been done. Stations would have been added on June 2 and other program services dropped.

7/ This problem may be exacerbated in cases where a single system straddles multiple ADIs. Under the FCC's ruling, unless a system is technically capable of providing different channel lineups to subscribers located in different communities of a single system, stations from both ADIs are considered local must carry stations throughout the entire system. Operators could be faced with the choice of installing expensive trapping devices or carrying signals filled with holes.

8/ Under the must carry provisions, a commercial station "substantially duplicates" another where a station "regularly simultaneously broadcasts the identical programming as another station for more than 50 percent of the broadcast week. For purposes of this definition, only identical episodes of a television series are considered duplicative and commercial inserts are excluded from the comparison." But under the Commission's syndex rules, a broadcaster may assert exclusive rights to programming regardless of when another station broadcasts that program (indeed, regardless of whether the requesting station is airing that program at all), and regardless of whether the episodes of a series are identical.

3. The Retransmission-Consent Rules Should Be Modified on Reconsideration.

Negotiations between stations and cable operators over retransmission consent will occur while reconsideration is pending. But there are several aspects of the Commission's ruling on retransmission consent that unfairly skew those negotiations away from the marketplace that Congress envisioned and toward the broadcasters' side of the table.

For example, although the Commission in its Notice of Proposed Rulemaking tentatively concluded that a station opting for retransmission-consent status would lose all rights that it might otherwise have had under Section 614, the Commission reversed itself in the Order, saying that the provisions of Section 614(b)(3)(A) (carriage of the entire signal and specified ancillary material), (b)(3)(B) (carriage of entire program schedule), (b)(4)(A) (technical quality), and (b)(9) (deletion notice) by their terms are applicable to all commercial stations carried by a cable system, not just those carried pursuant to the carriage obligations of Section 614. Thus, the Order puts a thumb on the scale on the side of broadcasters in retransmission-consent negotiations by dictating the outcome with respect to content to be carried, signal quality, and deletion notification. This result is directly at odds with Section 325(b)(4), which provides:

> "If an originating television station elects under paragraph (3)(B) to exercise its right to grant retransmission consent with respect to a cable system, the provisions of section 614 shall not

> apply to the carriage of the signal of such station by such cable system".

47 U.S.C. Section 325(b)(4) (emphasis added).

If, however, on reconsideration, the Commission were to agree that certain modifications to its retransmission consent rules were warranted, that relief may well come too late in the day for cable operators.

B. NCTA's Members Will Be Irreparably Injured If The Commission Does Not Issue A Stay.

Without an award of a stay, NCTA's operator and programmer members will suffer irreparable injury.[9/] On June 2, 1993, cable systems must begin carriage of their full complement of commercial must carry signals. For all such signals not currently carried, operators must purchase and install signal reception and processing equipment, notify franchising authorities and subscribers, and possibly rearrange channels on the basic tier, and delete or reposition certain broadcast or non-broadcast program services to make room on the basic tier. Operators also may be required to retrap to enlarge the basic tier's channel capacity, revise published programming guides, channel cards and other market materials. This process may be required to be repeated on October 6, 1993, once channel

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9/ To show hardship, a petitioner must demonstrate that the "regulation requires an immediate and significant change in the conduct of [petitioner's] affairs with serious penalties attached to noncompliance." Abbot Laboratories v. Gardner, 397 U.S. 136 (1967); South Carolina Elec. & Gas Co. v. ICC, 734 F.2d 1541, 1545 (D.C. Cir. 1984).

positioning and retransmission consent provisions take effect.

Therefore, cable systems' channel lineups, agreements with cable programmers, and subscriber viewing patterns, would be disrupted at least twice -- first, when operators begin carrying commercial stations on June 2, and second, when operators revise their channel line-ups to reflect retransmission consent and channel positioning by October 6. And certain interim changes -- caused by expanding ADIs or stations responding to signal strength deficiencies or willing to indemnify for copyright liability -- may cause further disruptions still. Then, cable operators would face the difficult task of "unscrambling the omelette" and imposing further disruption on their subscribers if petitions to reconsider the rules were subsequently granted. Moreover, cable programmers would be unable to reclaim their loss of audience from being dropped or repositioned, or the revenue derived therefrom.

C. The Balance of Hardships Favors NCTA.

Given that the vast majority of local broadcast stations are carried now by cable operators and have been voluntarily carried since the last set of must carry rules were struck down in 1987, a stay would generally preserve the status quo.

Some broadcast stations that would be eligible for must carry status may have to wait an additional few months -- until reconsideration is decided -- before gaining carriage. But the injury to operators and programmers vastly outweighs their injury. Indeed, these stations have done without must carry

protection for years; many have flourished, and no irreparable harm is likely to occur. In any event, these broadcasters have the unique ability to reach their viewing public over-the-air, unlike the non-broadcast program services that they will displace on cable systems.

D. The Public Interest Favors Grant of a Stay.

The public interest will be served by grant of a stay. The current timetable for implementation of the must carry and channel positioning requirements will cause massive avoidable confusion for subscribers. Delaying implementation of these regulations until the Commission has had an adequate opportunity to fully consider their consequences will inure to the benefit of the public. Failure to stay the rules, in contrast, would result in irreparable damage to program services, to the detriment of the public.

CONCLUSION

For the foregoing reasons, NCTA respectfully requests that the Commission stay enforcement of the must carry rules and related requirements pending a ruling on reconsideration. Alternatively, if the Commission should decide not to stay the rules pending conclusion of the administrative review process, we request that a stay be issued pending review in the Court of Appeals.

Respectfully submitted,

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